

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:MCT:CLE:PIT:TL-N-3977-01
DPLeone

date: July 31, 2001

to: Carlton L. Hill, Team Manager, # 1707 (LM:MCT)

from: Associate Area Counsel (CC:LM:MCT:CLE:PIT)

subject: [REDACTED] - [REDACTED] and [REDACTED]
Form 872 and Form 2848 language following organizational changes

This is in response to your June 13, 2001 request for advice with respect to an extension of the statute of limitations for the tax years ended [REDACTED] and [REDACTED]. You have also requested advice regarding the validity of the Form 2848, Power of Attorney, following the organizational changes. This memorandum should not be cited as precedent. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

The advice given herein is contingent upon the accuracy of the factual representation that [REDACTED] continues in existence and has not been dissolved.

ISSUES

1. After the organizational changes effective on [REDACTED], what is the proper name to be used on the Forms 872, Consent to Extend the Time to Assess Tax?
2. Who should sign the Forms 872?
3. Is a replacement of the Form 2848 Power of Attorney necessary?

ANSWERS

1. The proper name to be used on the Forms 872, is as follows:

[REDACTED]
formerly known as [REDACTED]
formerly known as [REDACTED]

[REDACTED].

The common parent of the group for the tax years at issue is still in existence and is still the entity that has the authority to execute the consents to extend the statute of limitations on behalf of the consolidated group. Accordingly, the consents executed by [REDACTED] on [REDACTED], and countersigned on behalf of the Internal Revenue Service on [REDACTED], are valid.

However, the executed Form 872 extensions may not be valid as to the subsidiary [REDACTED] (EIN: [REDACTED]), since said subsidiary has merged out of existence. You will need to secure a Form 872 consent from the successor corporation, [REDACTED] (EIN: [REDACTED]), formerly known as [REDACTED] (" [REDACTED] ") to extend the statute of limitation for the successor's several liability for the consolidated tax. The Form 872 consent agreement to be signed by [REDACTED] will have to contain a footnote to identify the liability for which the statute is being extended (i.e., after the name on the first line, [REDACTED], formerly known as [REDACTED], place an asterisk with the following phrase: as successor in interest to, by way of merger with, [REDACTED] (EIN: [REDACTED]) for its several liability for the consolidated income tax on the returns filed by [REDACTED] (EIN: [REDACTED]), formerly known as [REDACTED] formerly known as [REDACTED], for the tax years ended [REDACTED] and [REDACTED].) The Taxpayer Identification Number to be placed at the top of the Form 872 is [REDACTED]. When soliciting the additional consent, please remember to include either Letter 907 or Publication 1035 with the solicitation.

2. An officer of [REDACTED] (" [REDACTED] "), formerly known as [REDACTED], formerly known as [REDACTED], should sign the consent for the consolidated group. An officer for [REDACTED], formerly known as [REDACTED], must sign the Form 872 for its several liability as successor.

3. Since the agent for the consolidated group for [REDACTED] and [REDACTED] is still [REDACTED] the power of attorney given by [REDACTED] is sufficient to address the liability of the group. However, the power of attorney is not good with regard to the several liability of [REDACTED], formerly known as [REDACTED].

██████████, successor in interest to ██████████
Accordingly, if necessary to deal with the subsidiary's several liability, an additional power of attorney should be secured.

FACTS

For the years ██████████ and ██████████, ██████████
██████████ ("██████████") ██████████, formerly known as ██████████
██████████, formerly known as ██████████
██████████ filed consolidated income tax returns.¹
██████████ (EIN: ██████████) ("██████████"),
formerly known as ██████████, formerly known as ██████████
was a wholly owned subsidiary on said consolidated tax returns.²

On ██████████, ██████████ a Delaware corporation, (then known as ██████████) was acquired by ██████████
██████████, a consolidated group. As of ██████████
██████████ was to be included with ██████████ consolidated group. As a result, ██████████ and subsidiaries filed a short-year tax return for the tax period ██████████ through ██████████
██████████.

On ██████████, ██████████ a Delaware corporation, was merged into ██████████, a Delaware corporation, with ██████████ surviving the merger. ██████████ then changed its name to ██████████.³
It is this organizational change that has prompted the request for advice.

The steps undertaken to effectuate the merger are as follows:

1. On ██████████, ██████████'s Board of Directors adopt a plan of liquidation ("Plan") which provides for "the complete liquidation of [██████████] for Federal, state and local income and franchise tax purposes only."

¹ The name on the consolidated tax returns for ██████████ and ██████████ was ██████████.

² The name of the corporation when the consolidated returns were filed for ██████████ and ██████████ was ██████████.

³ Note the addition of the comma to the corporate name.

2. On [REDACTED], [REDACTED], as the holder of all issued and outstanding shares of the capital stock of [REDACTED], consents to the Plan.
3. As of [REDACTED], [REDACTED], pursuant to the Plan, declares the first liquidating distribution to be made under the Plan. The liquidating distribution is to consist of all of the outstanding stock of [REDACTED], which is to be distributed to [REDACTED], as sole shareholder of [REDACTED]. The distribution is to occur on [REDACTED].
4. As of [REDACTED], the [REDACTED] shares are distributed to [REDACTED].
5. As of [REDACTED], the [REDACTED] shares are contributed by [REDACTED] to the surplus capital of [REDACTED] (a wholly-owned subsidiary of [REDACTED]), then further contributed to [REDACTED] (a wholly-owned subsidiary of [REDACTED]), and then, finally, contributed to [REDACTED] (a wholly-owned subsidiary of [REDACTED]).
6. With an effective date of [REDACTED], [REDACTED] merges into [REDACTED] (subsidiary into parent with [REDACTED] surviving)⁵, and [REDACTED] changes its name to [REDACTED].

⁴ It is our understanding that, prior to the [REDACTED] acquisition by [REDACTED], that the shares of [REDACTED] were not owned by [REDACTED]. In fact, it is our understanding that [REDACTED] was the highest tier domestic corporation, and thus was properly the common parent for the consolidated group for the tax years [REDACTED] and [REDACTED]. Please verify the accuracy of this understanding and, if this is incorrect, please bring this to Attorney Leone's attention immediately.

⁵ Pursuant to Del. Code Ann. tit. 8, § 253 (2001), the merger of the subsidiary into the parent was effectuated by the filing of a Certificate of Ownership and Merger, in which Certificate [REDACTED] merged into itself [REDACTED] and assumed all of [REDACTED] liabilities and obligations.

On [REDACTED], [REDACTED], as vice-president and treasurer of [REDACTED], executed a consent to extend the statute of limitations for the [REDACTED] tax year to [REDACTED],⁶ and executed a consent to extend the statute of limitations for the [REDACTED] tax year to [REDACTED].⁷ [REDACTED] is not an officer of [REDACTED]. The consents identify the taxpayer as [REDACTED], and further indicate (in a separate paragraph referenced by an asterisk) that [REDACTED] is the current name of the parent corporation formerly known as: [REDACTED] (and subsidiaries); formerly known as [REDACTED]. On [REDACTED], the consents for both the [REDACTED] and [REDACTED] tax years were executed by the Team Manager on behalf of the Internal Revenue Service.

Although [REDACTED] has adopted a plan of liquidation, and has made a first distribution pursuant to said plan (of the [REDACTED] shares), it has been represented by counsel for [REDACTED] that [REDACTED] has not been dissolved, nor will it be dissolved. The Plan of Liquidation that was adopted provides for complete cancellation or redemption of all of its stock through a series of distributions, pursuant to Internal Revenue Code § 332, with the distributions to be completed within three years of the close of the taxable year in which the first of the series of distributions was made under the Plan. The terms of the Plan are consistent with the representation that [REDACTED] is still in existence. Further, it appears as if the winding down or liquidation may take at least three years from the close of [REDACTED] (the taxable year of the first distribution).⁸

DISCUSSION

Under the consolidated return regulations, the common parent of a consolidated group is the sole agent for each subsidiary in the

⁶ Prior consents to [REDACTED] and [REDACTED] were obtained.

⁷ Prior consent to [REDACTED] was obtained.

⁸ Additionally, under Delaware law, a corporation can continue to take actions to wind down its affairs for at least three years following dissolution. 8 Del. C. § 278 (2000). Executing a consent to extend the statute of limitations is within the parameters of a "winding down" activity.

group. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Generally, the common parent for a particular consolidated return year remains the common parent agent for purposes of extending the period of limitations with respect to that year even though that corporation is no longer the common parent of that group when some action, such as consenting to an extension of the statute of limitations, needs to be taken for that year. Under the regulations, the common parent's authority to act as an agent for the group is determined on a year-by-year basis, so for any particular year the entity that is the common parent for that year is the sole agent for procedural matters related to that year. So long as the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with respect to the years in which it was the common parent for the group. Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

The general rule does not apply when the common parent is not in existence at the time such action is necessary. Treas. Reg. § 1.1502-77(d). The common parent is considered to have gone out of existence when it formally dissolves under state law or merges into another corporation. As stated above, it is our understanding that [REDACTED] has not been dissolved under state law nor merged into another corporation. Accordingly, the general rule should still apply and [REDACTED], as common parent for the [REDACTED] and [REDACTED] tax years, should execute the Forms 872 to extend the statute of limitations.

In addition to the general rule, Temp. Reg. § 1.1502-77T is applicable in this case since [REDACTED] has ceased to be the common parent of its group ([REDACTED] is the holder of record of all of the issued and outstanding shares of capital stock of [REDACTED]), and the statutes of limitation that are to be extended are for taxable years for which the due dates (without extensions) for filing the consolidated returns are after [REDACTED].

Under Temp. Reg. § 1.1502-77T(a)(4)(i), there are "alternative agents" which are authorized to sign statute extensions for the group. One of the permissible "alternative agents" which may sign the waiver is the common parent of the group for all or any part of the year for which the waiver applies. Since [REDACTED] is a proper alternative agent, it should sign the consents with respect to the years for which it was the common parent.

Finally, your question following the organizational changes seems to show concern for the fact that the subsidiary [REDACTED] is no longer in existence, having been merged into [REDACTED], and that there is no overlap in the officers between [REDACTED] and [REDACTED]. It may be that you are questioning the ability of officers of [REDACTED] to act "on behalf of" [REDACTED].

An officer of [REDACTED] can sign the consents for the group. I.R.C. § 6062; Rev. Rul. 83-41, 1983-1 C.B. 349. However, the officer ([REDACTED]) may not be able to extend the statute of limitations with regard to the subsidiary [REDACTED]. [REDACTED] went out of existence when it merged into [REDACTED], and there is a question as to whether the former parent of the consolidated group, otherwise a proper agent for the group, has the authority to act on behalf of a subsidiary once that subsidiary merges into another corporation that is not, and was not, a member of the consolidated group. Due to the merger, [REDACTED] no longer exists while [REDACTED] will be the party ultimately severally responsible for the consolidated income tax liabilities, if any, as successor by merger to [REDACTED] 8 Del. C. §§ 253(a) and 259(a) (2000). Accordingly, it is necessary to get a consent signed by an officer of the successor corporation, [REDACTED], formerly known as [REDACTED]. Likewise, the power of attorney is not valid as to the successor by merger to [REDACTED]. If you need to deal with a representative of the successor in order to secure a consent, or with respect to any other matter connected to its several liability, a power of attorney form, signed by an officer of the successor [REDACTED] Communications, must be secured.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. Also, if you have any questions, please call Donna P. Leone at 412-644-3442.

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By: _____
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